AUG 23 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 344

COMPANIA de VAPORES INSCO, S.A., THE BALOISE MARINE INSURANCE CO., LTD., THE CHRYSLER CORPORATION, COMPANIA IMPORTADA de AUTOS y CAMIONES, S.A., and COMPANIA de AUTOS y TRANSPORTES, S.A.,

Petitioners,

versus

MISSOURI PACIFIC RAILROAD COMPANY, GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY and TEXAS PACIFIC-MISSOURI PACIFIC TERMINAL RAILROAD OF NEW ORLEANS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES

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COMPANIA de VAPORES INSCO, S.A., THE BALOISE MARINE INSURANCE CO., LTD., THE CHRYSLER CORPORATION, COMPANIA IMPORTADA de AUTOS y CAMIONES, S.A., and COMPANIA de AUTOS y TRANSPORTES, S.A.,

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TO THE HONORABLE THE CHIEF JUSTICE
AND THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

The petition of Compania de Vapores Insco, S.A., The Baloise Marine Insurance Co., Ltd., The Chrysler Corporation, Compania Importada de Autos y Camiones, S.A., and

Compania de Autos y Transportes, S.A., with respect shows unto this Honorable Court as follows, to-wit:

I

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Trial Court was not reported; the opinion of the Court of Appeals for the Fifth Circuit was reported as *Compania de Vapores Insco, S.A., The Baloise Marine Insurance Co., Ltd., The Chrysler Corporation, Compania Importada de Autos y Camiones, S.A., and Compania de Autos y Transportes, S.A., Appellants, v. Missouri Pacific Railroad Company, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company and Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans, Appellees,* 232 F. (2d) 657, 1956 AMC 764 (CCA 5th, 1956).

The judgment, opinion and order of the Court of Appeals may be found in the Appendix herein, the judgment and findings of the Trial Court being contained in the transcript of the record filed in the Court of Appeals, additional copies of which have been filed herewith.

II

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 20, 1956, and a rehearing was denied by the court on May 28, 1956.

The jurisdiction of this Honorable Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C.A. 1254 (1).

III

THE QUESTIONS PRESENTED FOR REVIEW

1) Does a common carrier perform its obligation and high duty of care to merchandise in its custody by providing old, deteriorated, light and flimsily constructed warehouses which completely fail in a squall which, though very severe, was of no greater intensity than had at many prior times been experienced in the neighborhood?

2) Where, as here, there is no genuine conflict in the evidence regarding the flimsy and seriously deteriorated nature of the facilities furnished by the carrier for the storage of goods entrusted to its care, but, on the contrary there are binding judicial admissions of their insufficiency, are the courts below justified in ignoring those admissions?

3) Can a railroad carrier escape liability for damage to goods caused by negligence which its managers have admitted?

IV

STATEMENT OF THE CASE

This is a suit for the recovery of damages sustained by a shipment of automobiles which moved by rail from Detroit, Michigan to Westwego, Louisiana, in an export movement. The damage was incurred on the early morning of April 4, 1952, when a severe spring windstorm struck the warehouses provided by the respondent rail carriers for the storage of these automobiles pending the arrival of the vessels on which they were to be exported. The respondents had custody of the automobiles which were being held by them on free time under the terms of the bills of lading issued by them and were acting in their capacities as common carriers. Federal jurisdiction was based on diversity of citizenship.

The respondents contended in the lower courts that the loss had occurred as a result of an act of God thereby absolving them from liability.

The contention of petitioners was that whether or not an act of God contributed to the loss, the plain concurrent negligence of the respondents made them liable.

The charge of negligence by the petitioners was levelled at the obvious inadequacy of the warehouse structures furnished by these carriers. The warehouses were of a light "mill-type", wooden construction and had been erected between 1898 and 1916.

The inadequacy of these structures and the negligence of the respondents was positively established, as a matter of law, by the overwhelming weight of the evidence and by the admissions of the managers of the respondent corporations, which testimony was disregarded by the Trial Court. The majority of the Court of Appeals, improperly treating the case as "only a routine factual dispute," affirmed on the basis of Rule 52 (a) of the Federal Rules of Civil Procedure, and overlooked the fact that the respondents' negligence had been established as a matter of law. The opinion of the court was written by Judge Rives who was in the position of dissenting from his own opinion. He stated in the sole opinion handed down by the court as follows:

> "Judge Rives is convinced that the more credible and convincing proof fails to show this weather disturbance was of such unanticipated and uncommon force and severity for the New Orleans area as would justify exonerating appellees, with their high obligation as common carriers toward protection of property in their custody, from liability based upon their contributing fault through the inadequate construction and negligent maintenance of these warehouse facilities prior to the storm, which he thinks is revealed by the testimony and particularly by the photographic proof. He would, therefore, reverse the district court's findings exonerating appellees from liability in this instance as 'clearly erroneous'."

Petitioners thereafter applied for a re-hearing which was denied by the Court of Appeals, without written opinion, Judge Rives still dissenting.

V

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The present application for a writ is made on the ground that the decisions below are contrary to the decisions of this Court to the effect that the common carrier is liable for its acts of negligence, notwithstanding they concur with causes for which the carrier might otherwise be exempted, such as, here, an "act of God," e.g., *Memphis Railroad Co. v. Reeves*, 77 U.S. (10 Wall.) 176, 19 L. Ed. 909 (1870).

The Court of Appeals, at least its majority, improperly dismissed as a matter of "routine factual dispute" a case in which, as a matter of law, the carriers utterly failed to sustain their burden of exculpation. This is not a situation for the application of the well known principle that this Honorable Court will not disturb the concurrent findings of the lower courts on pure question of fact; it is rather a case in which, as a matter of law, the carriers have not only failed to exculpate themselves, but have through their managing employees, admitted negligence.

Apart from any consideration as to whether or not the finding of the Trial Court that the respondents were not negligent was "clearly erroneous", as Judge Rives concluded, it directly contradicts certain judicial admissions of the respondents' managing officers which constituted clear admissions of negligence on the part of the respondents. No consideration has ever been given to these admissions or their effect upon the case by either of the lower courts.

Although Judge Rives, in writing the opinion of the Court of Appeals, stated that he was assuming that the respondents were liable based upon their maintaining [illegible] through the inadequate construction and negligent maintenance of these warehouse facilities prior to the storm, this is not a routine dispute of facts as the opinion of the Court of Appeals would seem to indicate. It is a case of admitted negligence, finding its base [illegible] in the Trial Court, whose error was affirmed on appeal.

A

THE FACTS

The warehouse facilities at issue were provided by the respondent railroad companies to house the merchandise which were then damaged in their custody as common carriers. The nature of the facilities which they were obliged to provide must be considered with reference to the locale of the warehouses and the forces of the weather which they were bound to anticipate.

The warehouses were located at Westwego, Louisiana, across the Mississippi River from New Orleans. Very severe windstorms occur in this area with considerable frequency. The New Orleans area was subjected to a severe hurricane in 1947 and the winds in that storm reached 110 miles per hour as recorded by respondents' meteorologist.[1] The character of the weather in the area was described by Judge J. Skelly Wright of the District Court for the Eastern

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[1] R. 325

District of Louisiana in a case arising out of the 1947 hurricane,[2] as follows:

> "New Orleans is in the heart of the tropical hurricane belt. Thirty hurricanes are known to have struck Louisiana. In the period 1907-1947, during which time the Stuyvesant Docks continuously belonged to defendant, three hurricanes of equal force struck New Orleans. Hurricanes are a weather factor which should and can be provided against in maintaining protective facilities such as wharf houses and warehouses in the New Orleans area."

Again Judge Wayne G. Borah, now on the Fifth Circuit, but then sitting on the same district court, said:[3]

> "It is a matter of common knowledge, of which this court will take judicial cognizance, that violent squalls are frequent in and about this harbor in the early spring. Wind of great force is to be anticipated in this navigation . . ."

These are fair statements of the weather conditions to be anticipated in the locality, and the obligation of carriers to provide adequate facilities to meet them is part and parcel of the carriers' duty to protect property entrusted to their custody.

The structure in this case was for the most part fifty-five years old, and the newest part was almost forty, having

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[2] *American Sugar Refining Co. v. I.C.R.Co.*, 103 F. Supp. 280 (E.D., La., 1952).

[3] *The Mendocino*, 34 F. (2d) 783 (E.D., La., 1929).

been added in 1916. It was "light mill-type construction,"[4] "light timber construction," posts, purlines, knee-braces, etc., with a wooden sheathing roof.[5] The roof was supported by posts with no bracing or fixing whatsoever at the floor except toenailing by common 60-penny nails; knee-braced into the purlines, four knee-braces to each post, again all connections being by common nails and *not* by bolts. The generally deteriorated condition of the old structure was obvious. A minimum budgetary allowance was allotted to current maintenance of this old structure.

The evidence in this case is overwhelming that this old, deteriorated flimsily constructed and negligently maintained structure was utterly inadequate to resist severe windstorms likely to occur with considerable frequency in this vicinity. This conclusion was fortified and made inescapable as a matter of law, by the significant, plain and binding admissions of the carriers' own managing and supervising employees.

The first of these, Lytle, was the "terminal engineer on the Texas Pacific-Missouri Pacific Terminal, in charge of maintenance and construction"[6]; the second, Pennebaker, was the "manager of the Texas Pacific-Missouri Pacific Terminal, in charge of all departments."[7] Both were graduate civil engineers,[8] in constant charge of these warehouses.[9]

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[4]R. 455.
[5]R. 407.
[6]R. 395, 396.
[7]R. 447.
[8]R. 396, 447.
[9]R. 398, 448.

These witnesses, the managing supervisors of the carriers' terminal, admitted — and that on direct examination — that the warehouses were no more than "in good shape to stand a fairly severe windstorm" of "90 miles per hour";[10] and that they were only in a state of "about 75%" of good condition or repair.[11] Considered in the light most favorable to the carriers, these statements are admissions that these old, poorly maintained structures were not, as a matter of law, adequate to withstand the more severe weather frequently occurring in the New Orleans area; and constitute clear admissions of negligence in design and maintenance for which the carriers are liable. The courts below did not give proper weight to these statements and admissions; on the contrary, the Court of Appeals mistakenly dismissed the case as an ordinary factual dispute. We submit that these admissions — entirely aside from the overwhelming character of all the other evidence — entitled petitioners to a judgment below. These admissions are facts established beyond dispute and as a matter of law, Rule 52 (a) of the Federal Rules of Civil Procedure can have no application. The finding of the Trial Court that the wind in the storm in suit merely exceeded 90 miles per hour can only emphasize this negligence. The result reached by the decision below is such that these railroad carriers have been absolved from the consequences of their own admitted negligence.

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[10] R. 405.
[11] R. 450.

B

THE LAW

This Hon Honorable Court has not enunciated the liability of a rail carr arrier for its acts of negligence, concurring with an alleged act act of God and causing damage to goods in its custody, since nce the decision of *Memphis Railroad Co. v. Reeves*, 77 U.S. (1 (10 Wall.) 176, 19 L. Ed. 909 (1870). The Court there appr pproved the following jury instruction:

> "'W When the damage is shown to have resulted from h n the immediate act of God, such as a sudden and e extraordinary flood, the carrier would be exempt b t from liability, *unless the plaintiff shall prove that t the defendant was guilty of some negligence in not ot providing for the safety of the goods.* * * *" (Italic lics Added.)

In the pre resent case the fact that respondents were "guilty of some n negligence in not providing for the safety of the goods" wa was amply proved by their own binding, judicial admissions ns that they were only "about 75%" sound, and were no n more than "in good shape to stand a fairly severe windstorm m" of 90 miles an hour, when very severe windstorms we ell in excess of that were to be anticipated in the area, and d occurred with a real degree of frequency.

By closing its eyes to the realities of the case, by wrongly dismissing g this as a routine dispute of fact, and by disregarding t these binding, judicial admissions of the respond-

ents' managers, the majority of the Court of Appeals has exonerated the carriers from responsibility for their admitted negligence.

VI

CONCLUSION

Petitioner accordingly seeks to have the law authoritatively stated and correctly applied to this case.

WHEREFORE petitioners respectfully pray that this petition be granted and that a writ of *certiorari* issue herein, directed to the United States Court of Appeals for the Fifth Circuit, directing and ordering that Court to certify and transmit to this Honorable Court, for its review and determination, a full and complete transcript of the record of all proceedings in the cause entitled "COMPANIA de VAPORES INSCO, S.A., THE BALOISE MARINE INSURANCE CO., LTD., THE CHRYSLER CORPORATION, COMPANIA IMPORTADORA de AUTOS y CAMIONES, S.A., and COMPANIA de AUTOS y TRANSPORTES, S.A., Appellants, versus MISSOURI PACIFIC RAILROAD COMPANY, GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY and TEXAS PACIFIC-MISSOURI PACIFIC TERMINAL RAILROAD OF NEW ORLEANS, Appellees", bearing number 15,770 on the Docket of the Court of Appeals for the Fifth Circuit, to the end that the judgment of the said Court of Appeals may be revised by this Honorable Court and the cause remanded to the Trial Court for the allowance of petitioners' damages;

Petitioners further pray for all general and equitable relief.

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CERTIFICATE OF SERVICE

I, Walter Carroll, a member of the Bar of the Supreme Court of the United States and one of the attorneys for the petitioners herein, do hereby certify that copies of this petition for a writ of certiorari have been served upon Messrs. C. Ellis Henican, Esq., Hibernia Building, New Orleans, Louisiana; Kalford K. Miazza, Esq., National Bank of Commerce Building, New Orleans, Louisiana, and Leonard B. Levy, Esq., National Bank of Commerce Building, New Orleans, Louisiana, attorneys for respondents herein by delivering the same to their respective offices on this _____ day of August, 1956.

APPENDIX

OPINION IN THE COURT BELOW

IN THE UNITED STATES

COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 15770

COMPANIA de VAPORES INSCO, S.A., THE BALOISE MARINE INSURANCE CO., LTD., THE CHRYSLER CORPORATION, COMPANIA IMPORTADORA de AUTOMOVILES y CAMIONES, S.A., and COMPANIA de AUTOMOVILES y TRANSPORTES, S.A.,

Appellants,

versus

MISSOURI PACIFIC RAILROAD COMPANY, GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY and TEXAS PACIFIC-MISSOURI PACIFIC TERMINAL RAILROAD OF NEW ORLEANS,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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(April 20, 1956.)

Before HUTCHESON, Chief Judge, and RIVES and CAMERON, Circuit Judges.

RIVES, Circuit Judge: This appeal is taken from the district court's judgment exonerating appellees, as common carriers, from any liability for damage to 150 Chrysler Corporation automobiles, owned and insured by appellants, which had been shipped from Detroit, Michigan, to Westwego, Louisiana, and were being stored "on free time" in appellees' Westwego warehouses awaiting export by ocean carrier to Cuba on April 4, 1952, when a severe windstorm struck the area, causing very extensive damage to the warehouses and the cars stored within.

The ultimate factual issue of whether the damage to the shipment was caused by an "act of God", within the provision of the bill of lading exempting appellee-carriers from liability,[1] was tried to the district court, sitting without a jury, and the court relieved appellees from liability upon subsidiary findings that (1) the April 4, 1952 weather disturbance was either "a small tornado" or a "line squall with tornadic characteristics", and was not the type of disturbance which builders and architects "usually anticipate" in

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[1]That provision reads:

"No carrier • shall be liable for any loss • or damage • or delay caused by the act of God," etc.

the design and construction of buildings in this area, and (2) the warehouses were in "reasonably good condition" prior to the storm and a "reasonably prudent inspection" revealed no "apparent deterioration", so that there was no negligent maintenance of the warehouse facilities by appellees contributing to the damage which would justify the recovery sought.[2]

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[2]Specifically, the court concluded from these and other subsidiary findings in pertinent part as follows:

"Where damage to a shipment is caused by an Act of God, the carrier is excused thereby from liability for the loss, unless the carrier is concurrently negligent, *Memphis & C.R. Co. v. Reeves*, 10 Wall, 176, 77 U. S. 176, 19 L. Ed. 909.

"A tornado or a line squall with tornadic characteristics (such as the weather disturbance, the proof of which was established in this case) is to be classed among the Acts of God which no human power can prevent or avert. *Mistrot-Callahan Co. v. Mo. Railroad of Texas*, 209 S.W. 775; *Western Millers Mut. Fire Ins. Co. v. Thompson, et al.*, 95 F. Supp. 993, 997.

"Where a carrier proves, by a preponderance of evidence, that an alleged loss resulted from an Act of God (such as the weather disturbance that occurred in this case) and the evidence further shows that the carrier was in no way negligent, the carrier is not liable for the said loss. *Memphis & Charleston Railroad Co. v. Reeves*, 10 Wall, 176, 19 L. Ed. 909; *Morrison v. Davis*, Pa. St. 171; *Denny Co. v. R.R.*, 13 Gray 481.

"After the establishment of the defense of an Act of God, the carrier has the burden of proceeding by establishing by a preponderance of the evidence the absence of any negligence on its part which might have contributed to the occurrence of the loss or damage. *East Tenn. V. & G. R. Co. v. Johnston*, 75 Ala. 596; *Agnew v. The Contra Costa*, 27 Cal. 425; *McGrath v. Northern P. R. Co.*, 121 Minn. 258, 141 N.W. 164.

"The defendants in this case have proved to the satisfaction of this Court that at the time of the aforementioned weather disturbance the warehouses of the TP-MP Terminal were sound, and that the condition of the warehouses did not in any wise contribute to the damage to or destruction of the said warehouses by the severe wind which struck them on the morning of April 4, 1952. Accordingly, the defense of an Act of God, namely, the wind disturbance that defendants proved to have occurred was the proximate and sole cause of the damage to or destruction of plaintiffs' automobiles, trucks and accessories.

"Consequently, the defendants are excused from their failure to have delivered the said automobiles, trucks and accessories in the same good order in which they were received at the point of shipment."

Appellants have invoked our duty of an extensive and laborious factual review by candid assertions that any "fair reading" of this voluminous record will reveal the trial court's findings as "clearly erroneous", and will prompt our reversal upon a "definite and firm conviction that a mistake has been committed", within the rule of *McAllister v. United States*, 348 U.S. 19, and *United States v. Gypsum Co.*, 333 U.S. 364. In effect, they insist that the trial court, while acknowledging the guiding principles, has failed in their application to the instant proof to exact that high obligation from common carriers to safeguard property entrusted to their care which the authorities require.

Appellees insist, however, that any disturbance of the judgment would be inapropos, because appellants admittedly do not attack the rule relied upon;[3] and the contested findings, making due allowance for the trial court's credibility advantage in resolving conflicting testimony, are amply supported by the proof.

We agree with appellants and the district court that appellees, in order to exonerate themselves from liability for the damage, were required to prove not only that the "line squall" constituted an "act of God" within the exemption from liability provision of their bill of lading, but also that

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[3]Indeed, appellees insist that the trial court's conclusions of law, heretofore quoted in footnote (2), were more favorable to appellants than they should have been, in that they actually placed a greater burden upon them than they were required to discharge under the law. Specifically, they contend that, after making their prima facie showing below that the weather disturbance causing the damage constituted an "act of God" within the exemptive provision of their bill of lading, the burden should then have been placed upon appellants to establish that the warehouses were inadequate and negligently maintained, which proof appellees assert appellants failed to introduce.

they were guilty of no negligence in the construction and maintenance of the warehouses which contributed to causing the damage.[4] For by its very definition, an "act of God" implies "an entire exclusion of all human agency" from causing the loss or damage.[5] Both parties rely mainly upon Louisiana decisions as controlling, appellants as supporting their contention that appellees had the burden of proof throughout, while appellees interpret them as requiring exoneration upon proof of an "act of God" within the exemptive proviso of their bill of lading.[6] We think it unnecessary, however, for us to resolve this asserted conflict in local law, for notwithstanding any contrary language in the Supreme Court of Louisiana's opinion in the National Rice Milling Co. case, *supra*, it seems to us that the issue of which party properly has the burden of proof to sustain a recovery under this federal statute [Carmack Amendment, Title 49 U.S.C.A. §20(11)] is governed by federal law, rather than by any state rule purporting to fix the onus of proof.[7]

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[4]See Texas & Gulf S.S. Co. v. Parker, 5th Cir., 263 Fed. 864, 868; Chicago & E.I.R. Co. v. Collins Produce Co., 7th Cir., 235 Fed. 857, 863; The Schickshinny, 45 F. Supp. 813, 817-818; Cf. American Sugar Ref. Co. v. Ill. C.R. Co., 103 F. Supp. 280, 286.

[5]9 Am. Jur., Carriers, §§708, p. 850, et seq.; 13 C.J.S., Carriers, §80, p. 159.

[6]Appellants cite Article 2754 of the Louisiana Revised Civil Code, National Rice Milling Co. v. N.O. & N.E.R. Co., 132 La. 615, 652, 61 So. 708; and Lehman Stern & Co. v. Morgan's L&TR & S.S. Co., 115 La. 1, 8.

Appellees seek to distinguish the National Rice Milling Co. case, supra, as inapplicable on the question of burden of proof, and rely upon American Cotton Co-operative Ass'n v. N.O. & Vicksburg Packet Co., 180 La. 836, 157 So. 733; E. Borneman & Co. v. N.O.M. & C.R. Co., 145 La. 150, 81 So. 882.

[7]Southern Express Co. v. Byers, 240 U.S. 612, 614; Southern Ry. Co. v. Prescott, 240 U.S. 632, 640; Chicago & Northwestern Ry. Co. v. Davenport, 5th Cir., 205 F. 2d. 589; Thompson v. James G. McCarrick Co., 5th Cir., 205 F. 2d. 897, 900; Delphi Frosted Foods Corp. v. Illinois Cent. R. Co., 6th Cir., 188 F. 2d. 343.

As heretofore stated, however, we think appellees were properly charged with the burden of proof throughout,[8] but in any event we regard this inquiry as purely academic upon this record, for decision here does not turn upon the burden of proof, but upon whether the record as a whole supports the district court's finding that appellees were free from negligence contributing to cause the damage, or whether that finding should be reversed as "clearly erroneous."

Almost any inclemency of weather causing property damage is an "act of God," in a limited sense, so that the problem is not solved by simply relying upon the conflicting testimony of experts as to whether this particular disturbance should technically be characterized as a "line squall", or "line squall with tornadic characteristics." From a realistic standpoint, we think decision in this type controversy should turn not upon technical, meteorological definitions, but upon the issue of whether the disturbance causing the damage, by whatever term it is described, is of such unanticipated force and severity as would fairly preclude charging a carrier with responsibility for damage occasioned by its failure to guard against it in the protection of property committed to its custody.

Thus far, this Court is substantially in agreement with the district court as to the controlling principles involved. The majority, however, are convinced that this record

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[8]Possibly the district court was correct in stating to counsel during a colloquy upon this issue below that the conflicting and inconsistent language of the decisions stems from the use by many courts of the phrase, "burden of proof", in lieu of the more precise phrase, "burden of going forward with the evidence."

presents for review only a routine factual dispute, in which the district court's acceptance of that portion of the proof tending to support its conclusion that the damage resulted solely from an act of God, within the exemption from liability provision of the bill of lading, and without contributing fault upon appellees' part, is not reversible as "clearly erroneous." Rule 52(a), F.R.C.P. Judge Rives is convinced that the more credible and convincing proof fails to show this weather disturbance was of such unanticipated and uncommon force and severity for the New Orleans area as would justify exonerating appellees, with their high obligation as common carriers toward protection of property in their custody, from liability based upon their contributing fault through the inadequate construction and negligent maintenance of these warehouse facilities prior to the storm, which he thinks is revealed by the testimony and particularly by the photographic proof. He would, therefore, reverse the district court's findings exonerating appellees from liability in this instance as "clearly erroneous."[9]

In view of the majority conclusion, the judgment is

AFFIRMED.

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[9]We consider it unnecessary to amplify this divergency in the Court's view by any extended analysis of the expert testimony as to the technical difference between line squalls, tornadoes, hurricanes, and the definition within which this particular disturbance is more appropriately embraced, from the conflicting testimony as to the damage and aftermath indicia recounted at such length at the trial. Excerpts of the material testimony, both as to the severity of the disturbance and the construction and maintenance of appellees' warehouses, are hereinafter separately abstracted as an appendix to this opinion.

APPENDIX

Appellees' weather expert, Nash C. Roberts, Jr., testified, in part, that there was a definite relationship between the formation of line squalls, thunderstorms, and tornadoes, all these weather disturbances being precipitated by unstable atmospheric conditions; that tornadoes or cyclones are generally considered extreme low pressure systems with a counterclockwise rotation, and often reach a velocity of 300 or 400 miles per hour; that "line squalls" are composed of a series of thunderstorms of severe velocity and often have tornadic potential, though a "line squall" and "a tornado", meteorologically speaking, are not the same; that "line squalls" usually have wind velocity of less than 75 miles per hour, though occasionally a severe line squall will get up to from 90 to 120 miles per hour, whereas tornadic velocity has been recorded as high as 500 or 600 miles per hour; that he recalled the weather disturbance on April 4, 1952, and had heard at that time the "characteristic roar that is associated with tornadoes"; that he inspected the damage the following morning near the Huey Long Bridge and considered it "devastating", and characteristically similar to that caused by a tornado, leaving a path "roughly a mile wide • that was terribly damaged"; that he considered the line squall as displaying "tornadic characteristics" because there was evidence of counterclockwise rotation from the fact that the Gretna radio station tower was somewhat twisted and bent, and the debris from the Huey Long Bridge was also "rolled" to some degree; and in addition there was evidence of "skipping" along its path; that taking all factors into consideration, he had reached the conclusion that the maximum velocity of the wind in the direct path of damage actually exceeded 100 miles per hour; that (on cross-

examination) he understood the Weather Bureau of New Orleans had "officially classified this ('52 disturbance) as a (line) squall and not * a tornado", and that its report stated that it did not cut a path "in the sense a tornado cuts a path", but that he did not agree with the report for the reasons previously stated, viz: because of the extensive damage within a well defined one mile area, with some evidence of counterclockwise rotation, explosive damage, sharp dips and rapid rises on barographs not even in direct path of damage, etc.; that he knew that the weather report was made by a climatologist after making an investigation, but that he entertained a different professional opinion from that weather bureau employee (Mr. Ralph Sanders) as to the severity of the storm, which he considered as exhibiting "tornadic characteristics", as evidenced by "skipping" and other indicia previously summarized.

Appellants' meteorologist, Alfred H. Glenn, gave contrary testimony to the effect that the damage was caused by "a severe line squall" with velocity "in the vicinity of 90 to 100 miles per hour", and he saw no evidence whatsoever of tornadic winds; that wind velocity in a tornado exceeds that in a line squall considerably, a tornado's velocity ranging between 300 and 800 miles per hour and the velocity of a "line squall" only infrequently attaining 100 miles per hour; that the maximum wind velocity of the April, 1952, disturbance, as recorded on the Huey Long Bridge anemometer was 91 miles per hour, which might vary "plus or minus 20%" from the wind velocity at the damaged area on the Westwego wharf; that he neither saw, nor do the weather bureau reports show, any reliable evidence of tornadic rotation, "skipping", or explosive damage which would justify characterizing the storm as a tornado, and in

his opinion the photographic exhibits did not justify any such conclusion; that this April, 1952, storm was of approximately the same velocity and severity of previous hurricane winds experienced in the New Orleans area of from 92-100 miles per hour, and he felt the weather bureau had properly characterized this disturbance officially as a "line squall"; that at about 100 M.P.H. velocity any wind would have a "roar" or hum to it, not necessarily identifying it as a tornado; and that the path of damage was not any conclusive evidence that a tornado occurred, since tornadoes describe various paths, some of which are erratic, and a "line squall" itself will exhibit strong gusts of wind, successive increases and decreases in wind velocity, etc., and he felt the weather bureau report, stated that the path of damage "was not indicative of a tornado", was justified.

Typical of the defensive testimony, offered by appellees to negative appellants' contentions as to the faulty construction and deterioration of these warehouses, is that introduced through their witnesses, Huey, Lytle and Pennybaker. Huey testified that the warehouses were of a type construction frequently encountered in the New Orleans area, and though he found the usual evidences of decay therein (such as some dry rot, etc.), such partial deterioration was not uncommon in that locality for that class and type structure, and did not prohibit its adequacy to withstand the usual "heavy windstorms" normally experienced in that area; that (on cross-examination) the warehouse buildings did provide some rigidity of resistance to west winds, the direction from which the storm came, in that they had "knee braces" for each vertical post, i.e. 4x4 "knee braces" to each post; that the vertical reinforcing posts in the warehouses were "toenailed to the flooring" and were not secured with

bolts or in any other way except for the diagonal "knee braces"; that the uprights and studs, etc. were also "toe-nailed", and the sills were nailed to the floor, with the walls of the warehouses constructed from corrugated iron.

Lytle testified that he could not remember how long before the storm he had made a wharf inspection, but his maintenance crew had been on the wharf the day before; that, in his opinion, the wharf was in "good condition" before the storm, and he did not know of any "dry rot" or "termite damage" to the "superstructure", though there was always some deterioration to the substructure, i.e. beneath the floor, which caused a "continuous maintenance problem", but this portion of the warehouses was not damaged by this storm; that some additional anchorages and fastenings have been added in the reconstruction of the wharf since the April, 1952, storm, in that the two rows of posts on both sides have been bolted to the caps in the substructure, and Teco fasteners have been added at the top of the column, which changes should make it more secure and improve it considerably, but that its construction at the time of the storm did not render it "weak and insecure", it then being "in good shape to stand a fairly severe windstorm" of about "90 miles an hour"; that "as much as 80%" of the $8,000 per month average allotment for wharf and warehouse maintenance was expended for repairs to the wharf's substructure, rather than for maintenance of the roof and shed where the actual damage occurred.

Pennybaker testified that, from his one or two inspections for a period of from six months to a year before the storm, he found the wharf "generally in good condition"; that some posts showed evidences of decay, but they were generally

spliced or replaced, and there was some deterioration to the substructure which was corrected as it developed and the decking (flooring) had failed from time to time due to decay or excess loading, at which time it was replaced, so that he would say that about the time of the storm the wharf was in a state of "about 75%" good condition or repair. On cross-examination, the witness refused to acknowledge that he knew of any instances where the warehouse posts actually came loose and hung free without fastening, but admitted that occasionally they were hit by trailers or stevedoring tractors, and some of them did show partial dry rot or decay at the bottom, but these were very few and were being replaced "as rapidly as possible"; that all the warehouses were typically "light mill type construction."

Among appellants' main witnesses were the elder McKee and Jessey. McKee testified that he had had some previous experience observing the decayed condition of these same warehouses from having been employed to survey great quantities of flour which had become badly infested by weevils and moths there in 1947 and 1951, and had then checked the wharves for evidences of infestation which might have originated in them and caused the damage to the flour shipments; that deterioration (i.e. dry rot, decayed timbers, holes in the walls, etc.) was "very prevalent" and many of the posts which were supposed to hold the roof of the wharf up were either not straight or had been knocked out of line; and that the color slides and photographs taken by him, showing misalignment of posts, holes in the walls, rotted and decayed conditions, etc., in his opinion, were representative of the condition of the wharf before the storm."

Blessey testified that he had made a study of the structure and the design of the Westwego warehouses, with particular reference to their ability to withstand this severe type west-to-east wind at the time of the April, 1952, storm; that the warehouse type structure was normally considered a "temporary structure" with its corrugated walls, inadequate nailing, etc.; and that he considered the warehouses designed as exhibiting a "temporary structure" because "toenailing" was considered inadequate design for "permanent type structures", and with holes in the walls and dry, rotted timber its resistance to winds of "significant" velocity was further reduced, especially its resistance to crosswise winds; that (on cross-examination) his computations were based on the assumption that the warehouses were new structures, i.e. in good state of repair, and with that assumption he applied a 100 M.P.H. wind stress to it, which would pull out the nails and knee braces, the critical spots in its design; and, in fact, at that wind velocity the nails would be loaded up to three or four times their normal stress resistance.

A True Copy:
Teste:

JOHN A. FEEHAN, JR.
Clerk of the United States Court of
Appeals for the Fifth Circuit.

(SEAL)

JUDGMENT

Extract from the Minutes of April 20th., 1956.

COMPANIA de VAPORES INSCO, S.A., THE BALOISE MARINE INSURANCE CO., LTD., THE CHRYSLER CORPORATION, COMPANIA IMPORTADORA de AUTOS y CAMIONES, S.A., and COMPANIA de AUTOS y TRANSPORTES, S.A.,

No. 15770.

versus

MISSOURI PACIFIC RAILROAD COMPANY, GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY and TEXAS PACIFIC - MISSOURI PACIFIC TERMINAL RAILROAD OF NEW ORLEANS.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Compania de Vapores Insco, S.A., The Baloise Marine Insurance Co., Ltd., The Chrysler Corporation, Compania

Importadora de Autos y Camiones, S.A., and Compania de Autos y Transportes, S.A., be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

ORDER DENYING REHEARING

Extract from the Minutes of May 28th., 1956.

COMPANIA de VAPORES INSCO, S.A., THE LOISE MARINE INSURANCE CO., LTD., E CHRYSLER CORPORATION, COMPANIA PORTADORA de AUTOS y CAMIONES, S.A., COMPANIA de AUTOS y TRANSPORTES, S.A.,

No. 157[illegible]70. versus

SSOURI PACIFIC RAILROAD COMPANY, Y A. THOMPSON, Trustee, MISSOURI PA-FIC RAILROAD COMPANY and TEXAS CIFIC - MISSOURI PACIFIC TERMINAL RAILROAD OF NEW ORLEANS.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Rives, , Circuit Judge, Dissenting."

SEP 19 1956
JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 344

COMPANIA DE VAPORES INSCO, S. A., THE BALOISE MARINE INSURANCE CO., LTD., THE CHRYSLER CORPORATION, COMPANIA IMPORTADA DE AUTOS Y CAMIONES, S. A., AND COMPANIA DE AUTOS Y TRANSPORTES, S. A.,

Petitioners,

versus

MISSOURI PACIFIC RAILROAD COMPANY, GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, AND TEXAS PACIFIC-MISSOURI PACIFIC TERMINAL RAILROAD OF NEW ORLEANS,

Respondents.

OPPOSITION TO GRANTING PETITION FOR CERTIORARI

C. ELLIS HENICAN,
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Respondents.

OPPOSITION TO GRANTING PETITION FOR CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

May It Please the Court:

Petitioners would have Your Honors reverse the United States Court of Appeals, Fifth Circuit, and the Honorable Herbert W. Christenberry, Judge of the United States District Court for the Eastern District of Louisiana, New Orleans Division, solely on the ground that **as a matter of law** certain "admissions" made by two employees of one of the respondents (not by either of respondents) were binding upon the Trial Court, as well as the Appellate Court, and conclusively showed such negligence as not to excuse respondents from the effects of an Act of God which otherwise would have relieved respondents from liability for the damages claimed by petitioners.

The so-called admissions were only a part of the voluminous evidence that was considered by the Trial Judge. The Trial Judge had only two questions to answer in order to reach a decision in this cause, namely:

1. Was there an Act of God of sufficient severity to release respondents from liability as common carriers?
2. If there was such an Act of God were respondents guilty of any negligence that contributed to the Act of God in bringing about the damages which form the basis of petitioners' claims?

The Trial Judge found that the damage resulted directly and solely from a weather disturbance which was

either a small tornado or a line squall with tornadic characteristics; that this disturbance was unheralded, struck quickly and with unusual intensity that exceeded 90 miles per hour and probably exceeded 100 miles per hour. (Tr. pp. 679-81). This conclusion was not disturbed by the Appellate Court; and petitioners do not now claim that this finding was erroneous, as a matter of law.

The Trial Judge also found that at the time of the severe weather disturbance, the docks and warehouses of respondents, in which were located the vehicles the damage to which forms the basis of this action, were sound and in good order, repair and condition, the same having been maintained by repairs and replacements when necessary, by a regularly employed crew of qualified laborers under the supervision of competent foremen and engineers; that from a reasonably prudent inspection there was no apparent deterioration; and that the warehouses had withstood all other wind disturbances. (Tr. p. 681). This finding was likewise not disturbed by the Appellate Court. There is substantial evidence in the record to support both findings; but petitioners would have this Court ignore all other evidence except certain "admissions" of two employees of one of the respondents.

It is opponent's position that the so-called admissions of these two witnesses (Lytle and Pennybaker) do not show the alleged negligence. Mr. Lytle merely "estimated" that the structure involved would withstand a windstorm of 90 miles an hour; but he also said that to his knowledge the structure had withstood winds that were considerably stronger. (Tr. p. 411).

Mr. Pennybaker estimated the "general condition of the wharf" (including sub-structure, decking and superstructure extending several thousand feet in length and several hundred feet in depth) at what he would call "about 75%". However, he was not worried about the superstructure (Tr. p. 453); and the wharves were under constant supervision and were repaired whenever any deficiencies manifested themselves. (Tr. p. 451).

Petitioners have plucked two isolated statements out of the rather extensive testimony of two of respondents' witnesses. The Trial Judge was not as a matter of law obligated to consider only these statements, but had the right to and did consider **all** of the testimony of these two witnesses, as well as the statements and testimony of **all** of the other witnesses and the voluminous testimony of evidence that was offered at the trial.

Quite obviously, the Trial Court felt that the two isolated statements in the light of all of the other evidence did not conclusively show negligence on the part of respondents; and the Appellate Court quite obviously found that the record includes substantial evidence to support this finding.

It is opponents' contention that the Trial Judge had the right to consider all of the evidence before deciding the factual question of whether or not respondents were guilty of any negligence. The Trial Judge, after hearing all of the witnesses, concluded that the respondents sustained what he considered to be their burden of proving absence of negligence.

The Appellate Court specifically considered whether or not the Trial Judge had substantial evidence upon which to base his conclusions. The Appellate Court specifically considered the so-called admissions of the two employees (see pages 24 and 25 of petitioners' application) and concluded that there was no error in the findings of the Trial Court that respondents' warehouses were sound and that their condition did not in any wise contribute to the damage and destruction of the warehouses by the severe weather disturbance of April 4, 1952.

The evidence as a whole convinced the Trial Judge that respondents' warehousing facilities were sound; that they had withstood all previous storms, hurricanes, and other weather disturbances in the New Orleans area, including the 1947 hurricane cited by petitioners; that the severity of the wind that damaged and destroyed respondents' warehouses was unprecedented in the New Orleans area; and that respondents could not have taken any reasonable precautions to protect its warehouses and petitioners' property from the tornado, or line squall with tornadic characteristics, which caused the damage.

The only real question involved in this case is whether or not respondents were negligent and thereby contributed to the Act of God which destroyed petitioners' property. The determination of such issue involved an analysis and evaluation of factual matters rather than the resolution of legal conflicts.

Since only a factual matter is presented for review, the present case is not one in which this Court should exercise its discretionary power of review by certiorari. This

is not a case that involves any serious general matters. (See *In re Woods, et al.*, 143 U. S. 202, 12 S. Ct. 417, 36 L. Ed. 125).

The application herein should be properly denied upon the authority of the following decisions:

Houston Oil Company of Texas v. Goodrich, et al., 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385, wherein this Court held:

> "As grounds for granting the writ petitioners alleged that the trial court erred in refusing to submit to the jury (1) whether the deed first dated was in fact executed; (2) whether it was presented for record before execution of the later one; (3) whether vendee in the prior deed was a bona fide purchaser for value; (4) whether the prior deed was forged; and (5) whether the action was barred by the three year Statute of Limitations. **The propriety of submitting these matters depended eventually upon an appreciation of the evidence.** Having heard it all, the trial court concluded there was not enough in support of any one of petitioners' above-stated claims to warrant a finding in their favor, and the Circuit Court of Appeals reached the same result. 226 Fed. 434, 141 C. D. A. 264.
>
> **"The record discloses no sufficient reason within the rule long observed why we should review the judgment below.** Forsyth v. Hammond, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 1095). (Emphasis added).

N.L.R.B. v. Pittsburg S. S. Co., 340 U. S. 498, 71 S. Ct. 453, 95 L. Ed. 479, wherein this Court said:

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place, we would find the record tilting one way rather than the other, though fair minded judges could find it tilting either way."

See also *Baker v. Schofield*, 243 U. S. 114, 37 S. Ct. 333, 61 L. Ed. 626; *W. J. McCahan Sugar Refining Company v. The Steamship Wildcroft*, 201 U. S. 378, 26 S. Ct. 467, 50 L. Ed. 794; *Boehmer v. Pennsylvania Railroad Co.*, 252 U. S. 496, 40 S. Ct. 409, 64 L. Ed. 680; and *General Talking Pictures Corporation v. Western Electric Co.*, 304 U. S. 175, 58 S. Ct. 849, 82 L. Ed. 1273, affirmed 305 U. S. 124, 59 S. Ct. 116, 83 L. Ed. 81.

Petitioners have not cited any authority for the alleged error upon which their application is based, except the case of *Memphis and Charleston Railroad Co. v. Samuel Reeves*, 77 U. S. (10 Wall.) 176, 19 L. Ed. 909.

This decision merely stands for the proposition that where a common carrier shows that damage resulted from an Act of God, it is exempt from liability unless a plaintiff proves that the common carrier was guilty of some negligence in not providing for the safety of the goods.

The Trial Judge did not follow the principle of the cited case. If he had, the petitioners would have been in a less favorable position before the Lower Court. On the contrary, in spite of the cited case, the Trial Judge required the common carriers (respondents) to disprove

negligence; and the fact that respondents discharged this burden merely emphasizes the extent to which the Trial Judge was convinced after considering all of the evidence.

By citing *Memphis and Charleston Railroad Co. v. Samuel Reeves, supra,* as their only authority in support of their application, petitioners necessarily concede that this case involves only a determination of facts, based upon all of the findings; and the purpose of this application is obviously in an effort to have this Court minutely examine all of the evidence for the purpose of concluding that the Trial Judge should have accepted petitioners' evidence rather than respondents' evidence; and that the Appellate Court should not have concluded that there is substantial evidence in support of the Trial Judge's conclusions!

It is respectfully submitted that there is no question involved in the present case which would justify the granting of petitioners' application; that this case involves purely a question of fact; and that it was the prerogative of the Trial Judge to determine the credibility of the witnesses and to evaluate the oral and documentary evidence.

While petitioners present an argument in support of the single proposition upon which this application is based, they have failed to cite any decision from this Court or from any Circuit Court in support of their position.

In their original appeal, petitioners designated fourteen alleged errors in the Conclusions of Fact reached by the Trial Judge. When this case was argued in the Appellate Court only two alleged errors were argued and it was not then contended that the Trial Judge was conclusively bound by the admissions of Lytle and Pennybaker. This

latter proposition was urged for the first time upon the application for rehearing and now forms the only point that is seriously urged as a basis for the granting of the present application. In the application for rehearing before the Appellate Court and in the application for writs before this Court petitioners have been unable to show that there is any established jurisprudence which supports the belatedly alleged error.

We respectfully submit, therefore, that the application for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

Supre I, Kalford K. Miazza, a member of the Bar of the neys eme Court of the United States and one of the attorcopies for the respondents herein, do hereby certify that writ es of this brief in opposition to the application for the Benja of certiorari have been served upon Walter Carroll, ney Lamin W. Yancey, and Edward S. Bagley, 825 Whittition Building, New Orleans, Louisiana, attorneys for pe-----ners herein, by delivering same to their offices on the ---- day of September, 1956.